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# Rape as Torture: Is South Africa in Breach of its International Obligations?

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## ABSTRACT

Rape is one of the most heinous and degrading crimes that exist. It attacks the victim's sense of human dignity and self-worth. Some argue that the crime of rape is akin to that of torture. The issue of rape is one that is experienced around the world; however, South Africa is one of the highest countries affected.

This paper argues that South Africa is in contravention of its international obligations under the United Nations Convention Against Torture, and the Convention on the Elimination of all Forms of Discrimination Against Women, specifically with regards to the crime of rape and its relation to the crime of torture.

This paper aims to prove the above statement through, first establishing a link between the crimes of rape and torture and that that this link is applicable in both international law and South African law. This paper will proceed to show that there are obligations, stemming from both international and domestic laws, on South Africa to take positive steps in preventing the crime of rape among private persons. This paper will demonstrate that through failing its obligation of due diligence in this regard, the state of South Africa fails to comply with the duties imposed upon it by international law.

## DEDICATION

*To my parents, for their love, support and encouragement; and without whom this would never have been possible.*

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# 1. CHAPTER 1

*'...Rape remains a phenomenon in respect of which all legal systems appear to be incompetent. We are [all] still searching for legal strategies to deal with rape.'*

- Clare McGlynn[1]

The right to bodily integrity is among the most fundamental rights afforded to human beings.[2] The right entails that each person is entitled to 'freedom of movement, security against violence, sexual satisfaction and reproductive choice'.[3] When a victim suffers sexual assault, however, this fundamental right is deeply infringed.

One of the most heinous and torturous forms of sexual assault is rape. The victims thereof, more often than not being women, not only suffer trauma from the ordeal, but must also cope with the social stigma that surrounds the crime of rape, the possibility of having unwillingly contracted a sexually transmitted disease, HIV, or falling pregnant, among other things.[4]

Law surrounding the crime of sexual assault, specifically regarding those aimed at the prevention and punishment of rape, has evolved tremendously worldwide over the last few decades.[5] Despite this progression, however, there are still many states throughout the international community in which reality is different from what is written in their legislation; one in which progressive laws against rape exist but have not had a substantial impact on the reduction of the amount of rape incidents itself.[6] This may be due to a number of reasons, ranging from the attitude society has toward rape, resulting in women not reporting the crime, to the inability of the authorities to find and prosecute offenders, to the poor implementation of punishment against the crime of rape by the authorities.[7] Perhaps it may even be due to the laws and punishments surrounding the crime of rape not being severe enough.

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[1] C McGlynn 'Rape as "Torture"? Catherine MacKinnon and Questions of Feminist Strategy' (2008) 16 *Feminist Legal Studies* 71 at 72.

[2] Article 5 of the Universal Declaration of Human Rights (1948); from here, this agreement will be referenced in text as 'the UDHR'.

[3] M Patosalmi 'Bodily Integrity and Conceptions of Subjectivity' (2009) 38 *Case Western Reserve Journal of International Law* 225.

[4] J Burchell *Principles of Criminal Law* 4 ed (2014) at 595.

[5] M Ellis 'Breaking the Silence: Rape as an International Crime' (2007) 38 *Case Western Reserve Journal of International Law* 225 at 246.

[6] R Bachman and R Paternoster 'A Contemporary Look at the Effects of Rape Law Reform: How Far have we Really Come' (1993) 84 *Journal of Criminal Law and Criminology* 553 at 574.

[7] Bachman op cit (n 6) at 168.

The crime of rape may be conducted in both the public and the private spheres. When it takes place in the private sphere – that is between private individuals – the act is considered as a severe offence. However, in international law, when carried out in the public sphere – that is, inflicted by, at the instigation of, or with the consent of a public official – the act of rape may potentially be considered as a form of torture, a crime punishable separately from rape.[8] It can be argued that the added element of torture in the crime of rape adds a certain weight in terms of the severity of and the punishments that should be afforded to perpetrators of the heinous act.

South Africa experiences one of the largest amounts of rape incidences in the world; approximately 41 500 rapes were reported in South Africa between 2018 and 2019;[9] this number has increased by approximately 1 000 from the previous year.[10] When the unreported incidences are taking into account, this amount is far higher. The crime of rape is an infringement of Section 12 of the Constitution of the Republic of South Africa which provides for the right to freedom and security of the person.[11] In particular, Section 12 (1) (c) addresses one's right to be free of all forms of violence from either public or private sources.[12]

The Constitution provides further, under Section 7 (2), that the state has an obligation to 'respect, protect, promote and fulfil the rights in the Bills of Rights'.[13] This means that when the state fails to protect people from infringements to their rights under Section 12, it fails in its Constitutional duty.[14] In addition to its Constitutional infringement, it may be argued that by failing to protect its people, the state is also in violation of South Africa's international obligations under binding international treaties.

This thesis will put forward the argument that by failing to protect its people against rape and other sexual assault, the state is in violation of its obligations under international law, and

[8] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by State Parties (2008) at para 18; from here, this document will be referred to in text as 'General Comment 2'.

[9] SAPS 'Annual Crime Report 2018/ 2019: Addendum to the SAPS Annual Report' *South African Police Service,* 2018, available at https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf, accessed on 6 January 2020.

[10] SAPS 'Annual Crime Report 2017/ 2018: Addendum to the SAPS Annual Report' *South African Police Service,* 2018, available at https://www.saps.gov.za/services/annual_crime_report2019.pdf, accessed on 19 June 2019.

[11] Section 12 of the Constitution of the Republic of South Africa, 1996; from here, this document will be referred to in text as 'the Constitution'.

[12] Section 12 (c) of the Constitution of the Republic of South Africa, 1996.

[13] Section 7 (2) of the Constitution of the Republic of South Africa, 1996.

[14] P de Vos and W Freedman *South African Constitutional Law in Context* (2014) at 632.

more specifically, the United Nations' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[15] as well as the Convention on the Elimination of all Forms of Discrimination Against Women,[16] among other international human rights agreements. In particular, this thesis will explore the possibility of rape that is perpetrated by private actors being considered as a form of torture; as such, a failure of the state to intervene in this regard would constitute a violation of the Torture Convention as well.

## 1.1. OBJECTIVE FOR THE RESEARCH

This paper, firstly, aims to determine how severely the crime of rape is considered in international and African regional law, as well as to examine the relationship between the crimes of rape and torture in those spheres. In addition, this paper aims to determine whether international law places a legal obligation on the South African state to practice due diligence and take positive steps in reducing and preventing the crime of rape among private persons. Lastly, this paper seeks to determine whether South Africa is in breach of its international obligations with regards to practicing due diligence and taking positive steps in reducing and preventing the crime of rape from taking place within the country.

As mentioned above, the crime of rape, more often than not, involves the male perpetrator(s) and the female victim(s). It is for this reason and for the purposes of this paper, that the crime of rape will be referred to as taking place when a man sexually assaults a woman.

## 1.2. RESEARCH QUESTIONS

1.2.1. What are the definitions and elements of the crimes of rape and torture in South African law?
1.2.2. Does international and African regional law consider rape as a form of torture?
1.2.3. Does the South African state have a legal obligation to practice due diligence and take positive steps in reducing and preventing rape among private citizens?

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[15] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); from here, this agreement will be referenced in text as 'the Torture Convention'.
[16] Convention on the Elimination of All Forms of Discrimination Against Women (1979); from here, this agreement will be referenced in text as 'CEDAW'.

1.2.4. Does South Africa fail in fulfilling its legal obligations under international law, specifically in reference to the Torture Convention and CEDAW, with regards to taking positive steps in reducing and preventing rape?

## 1.3. STRUCTURE AND METHODOLOGY

The remainder of this paper will be dealt with in four sections:

Chapter 2 will discuss the legal definitions of 'rape' and torture' in South African and domestic law. The main elements of each definition will be discussed in turn. For rape, those elements include intention on the part of the perpetrator, sexual penetration and a lack of consent on the part of the victim. For torture, the element of 'severe pain and suffering' will be dealt with; as the South African definition of torture comprises of two subsections, each subsection will be discussed in turn.

Chapter 3 will address a general history of the development of rape laws, followed by the international laws pertaining to rape and torture; whether or not states have an obligation under international law to protect against harmful acts committed by private individuals will be discussed. Thereafter, African regional laws will be discussed. This will be followed by a brief consideration of the relationship between rape and torture in certain other regions, namely the Inter-American legal region and the European Union legal region. The link between the laws that govern the crimes of rape and torture will be a running theme throughout.

Chapter 4 will address the current South African law in relation to the protection of women from acts of rape and torture. It will explore whether South Africa is under a legal obligation to reduce and prevent the amount of rapes that take place in the country. The pieces of legislation that will be considered include the Constitution, the Prevention of Combating and Torture of Persons Act,[17] the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[18] and the Domestic Violence Act.[19] This Chapter will discuss whether rape may be considered as a form of torture in South Africa. Finally, this Chapter will discuss whether the

[17] Prevention of Combating and Torture of Persons Act 13 of 2013; from here, this document will be referred to in text as 'the Torture Act'.
[18] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; from here, this document will be referred to in text as 'the Sexual Offences Act'.
[19] Domestic Violence Act 116 of 1998; for the purposes of this paper, the Domestic Violence Act will only be referred to in terms of sexual offences, such as rape, among others.

state of South Africa, through its law and the implementation of such law, is in violation of its obligations under international treaties.

Chapter 5, the conclusion, will present a summary of the main findings of this paper with regards to South African law and the classification of rape as a form of torture.

## 2. CHAPTER 2

### 2.1. INTRODUCTION

Chapter 2 will address the legal definitions of 'rape' and torture' in South African and domestic law. The main elements of each definition will be discussed in turn. For rape, those elements include intention on the part of the perpetrator, sexual penetration and a lack of consent on the part of the victim. For torture, the element of 'severe pain and suffering' will be dealt with; as the South African definition of torture comprises of two subsections, each subsection will be discussed in turn.

### 2.2. THE DEFINITION OF RAPE

Section 3 of the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act provides that 'any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape'.[20] As mentioned above the three main elements found in the South African (and many other countries) definition of rape are: intention, sexual penetration and lack of consent.[21] As such, it is inferred that all three elements must be present in order for an act to be considered as rape. The scope of each of these elements in South African law will be explored and discussed below.

#### 2.2.1. INTENTION

The element of intention, or *mens rea* (the mental element of the crime of rape), refers to the state of mind of the perpetrator during the occurrence of the crime. In the instance of rape, the perpetrator must have the 'intent to sexually penetrate the complainant [with the foresight or knowledge] that the complainant has not consent to the act of penetration'.[22] This seems to

[20] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[21] DW Denno 'Evolutionary Biology and Rape' (1999) 39 *Jurimetrics* 243 at 244.
[22] *R v K* 1958 (3) SA 420 (A) at page 421; Burchell op cit (n 4) at 609.

suggest that if the perpetrator reasonably believes that the victim consented, then the former will not be guilty of rape.[23] In order for the perpetrator's belief to be considered reasonably, it is implied that the victim gave some indication of consent as to the sexual assault. It is due to the personal nature of the crime of rape that this is problematic.[24]

Taking into consideration that there are often no witnesses to the crime of rape, providing evidence as to intention and lack of consent may become difficult on the part of the victim.[25] Additionally, taking into consideration the power imbalances between men and women, even today, it is easy to put the scrutiny on the female victim when the male perpetrator, in most cases, claims that he believed that the woman had given her consent. Thus, in allowing the perpetrator this defence of 'assumed consent', the victim's actual lack of consent may be said to be often disregarded. Such situations may often arise when the perpetrator believes that he has a right over the victim; for example, when the act takes place as part of a cultural practice, or within a marriage or other relationship. Neither of these instances serve as valid defences against a victim's allegation of rape or sexual assault.[26]

In South Africa, the *mens rea* required for rape is that of *dolus eventualis*.[27] This means that if the perpetrator foresees the possibility that the victim might not consent, but proceeds with penetration despite this, the mental requirement for the act to constitute rape will be satisfied.[28] Whether or not the victim consented would be determined by the perpetrator's actual *bona fide* intention rather than by its alleged interpretation of the victim's actions.[29] In this way, the victim's actual lack of consent is respected by South African law.

However, unless the perpetrator admits his intention to commit rape, it is incredibly difficult to know with certainty what his true intention was at the time that the incident took place. It is, therefore, necessary to consider the facts of what happened, and from those facts, attempt to determine what the perpetrator's true intention was at the time of the sexual assault.

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[23] Burchell op cit (n 4) at 609.
[24] Bachman op cit (n6) at 560.
[25] Ibid.
[26] Section 56 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; It should be noted that the only instances in which cultural practices serve as a defence are listed under Sections 9 and 22 of the Sexual Offences Act, neither of which specifically include rape or sexual assault.
[27] Burchell op cit (n 4) at 611.
[28] Ibid.
[29] T Illsey 'The defence of mistaken belief in consent' (2008) 1 *South African Computer Journal* 72; Burchell op cit (n 4) at 609.

In other words, in order to confirm the perpetrator's subjective intention at the time of the rape, it is necessary to rely on objective evidence as well.[30]

### 2.2.2. SEXUAL PENETRATION

The element of sexual penetration, or the *actus reas* (the physical element of the crime of rape) refers to the insertion of any body part or object into the orifice of another person.[31] In South Africa, the term 'sexual penetration' is preferred over the term 'sexual intercourse' in both the common law and legislation.[32] Prior to the Constitutional Court case of *S v Masiya* and the Sexual Offences Act,[33] the common law definition of rape described the act as sexual intercourse which was limited to penile/ vaginal penetration only.[34] The term 'sexual penetration', on the other hand, broadened the definition to include the perpetrator using objects, genital organs or other body parts to penetrate the mouth, anus, or genital organs of the victim.[35]

The sexual penetration element in the crime of rape is often linked with factors such as force and resistance. Although these two factors are not specifically included as requirements in many jurisdictions, including under Section 3 of the Sexual Offences Act,[36] it can be said that evidence of force on the part of the perpetrator, and resistance on the part of the victim may serve as further proof that the assault was intentionally not consensual. Put differently, perpetrators are more likely to be found guilty by law enforcement, ranging from police officers to the judges of the court, when the claim of non-consensual sexual assault is accompanied by proof of physical force and resistance.[37] This may be seen as part of the objective evidence required in order to determine the intention of the perpetrator and whether there was consent on the part of the victim.[38]

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[30] Illsey op cit (n 29) at 65.

[31] Burchell op cit (n 4) at 608; the term 'sexual penetration; goes beyond penile/ vaginal rape to include the above.

[32] Ibid.

[33] *S v Masiya* 2007 (2) SACR 435 (CC).

[34] Burchell op cit (n 4) at 598).

[35] Burchell op cit (n 4) at 608; The genital organs and other body parts, as referenced above, may form part of being a human being or an animal.

[36] Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[37] DP Bryden 'Redefining Rape' (2000) 3 *Buffalo Criminal Law Review* 317 at 357.

[38] Ibid.

An example of such physical force and resistance is the damage that the victim incurs to her genital organs as a result of forced penetration.[39] Provided that the victim undergoes a medical examination as soon as possible after the incidence, evidence of such force may be obtained.[40] Unfortunately, however, in far too many instances and for a vast number of reasons, many women do not report rape or other kinds of sexual assault, neither to a police officer nor to a doctor, in time;[41] rape victims often do not even inform those closest to them of the incident.[42] As such, in many cases, it may be said that objective evidence of forced sexual penetration is difficult to obtain, and even more so once time has passed and wounds incurred from the rape have healed.

### 2.2.3. LACK OF CONSENT

In the context of South African law, consent refers to both parties involved 'voluntarily or without coercion' agreeing to sexual penetration;[43] both parties must share a meeting of the minds.[44] Thus, where there is a lack of consent (on the part of the victim), the act is considered to be rape.

This element of consent, however is one that may easily be confused with submission.[45] Consent, on the one hand, is present when a woman who is control of her mind and body, freely and unconstrainedly agrees to submit to sexual penetration.[46] On the other hand, submission alone may be considered as the appearance of consent but without consent being present. In other words, in terms of sexual penetration, with consent comes submission, however the converse cannot be said as submission, express or implied, does not necessarily involve consent.[47] There are many instances in which victims of sexual assault may choose to submit, although not consent to their perpetrators.

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[39] *Jaars and Another v S* (2018) SAGPJHC 428.
[40] K Naidoo 'Rape in South Africa – a Call to Action' (2013) 103 *The South African Medical Journal* 210 at 210.
[41] N du Plessis, A Kagee and A Maw 'Women's Experiences of Reporting Rape to the Police: A Qualitative Study' (2009) 45 *Social Work* 275 at 276.
[42] Ibid.
[43] Burchell op cit (n 4) at 604; *R v Swiggelaar* 1950 (1) H61 (A) at 110 – 111.
[44] Burchell op cit (n 4) at 222.
[45] GE Panichas 'Rape, Autonomy, and Consent' (2001) 35 *Law and Society's Review* 231 at
[46] EW Puttkammer 'Consent in Rape' (1925) 19 *Illinois Law Review* 410 at 410.
[47] Burchell op cit (n 4) at 223; *S v S* 1971 (2) 591 (A) at page 596.

When women are subject to the crime of rape, there is often the possibility of being harmed further or even killed by their male perpetrator(s).[48] It may be due to this immediate threat of further harm to themselves or others, which may not always cumulate in actual harm, that women decide to submit rather than resist. Victims of sexual assault may also be overpowered by their perpetrator, whether physically or through being drugged, and, as such, not have an opportunity to resist. Submission in the face of the above does not constitute consent to sexual penetration; South African criminal law provides that where consent was given due to duress or intimidation by another, such consent is treated as never having been given.[49]

The Sexual Offences Act describes a number of instances in which it is impossible for consent or the appearance thereof (submission) to be given by the victim, but which will be considered as invalid due to the nature of the situation. For example, where the victim is legally incapable of providing her consent,[50] or where she is unable to 'appreciate the nature of the act',[51] any consent that she provides will be considered as invalid.

Similarly, the consent of a victim may be considered invalid when she has been forced to consent to a perpetrator's abuse of authority.[52] Such authority may present itself in the form of a superior in the workplace, a doctor, a teacher, or a police officer, among many others.[53] The victim's submission in this context will not be considered as consent.[54] An example of this was found in the case of *S v Egglestone*.[55] This matter concerned the perpetrator having offered the victim a job in a new post[56] During her training, the perpetrator took advantage of her after telling her that she would not get the job if she did not have sex with him.[57] The Supreme Court of Appeal held that, due to the perpetrator being older and in a position of power over the victim, she was not able to give true consent.[58]

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[48] JA Scutt 'Consent Versus Submission: Threats and the Element of Fear in Rape' (1977) 13 *Western Australian Law* Review 52 at 57

[49] *Ex Parte Minister of Justice: In re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) at 240; Burchell op cit (n 4) at 223; Section 1 (3) (a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[50] Section 1 (3) (d) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[51] Section 1 (3) (d) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[52] Section 1 (3) (b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[53] Panchias op cit (n 45) at 260.

[54] Section 1 (3) (b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

[55] *S v Egglestone* 2009 (1) SACR 244 (SCA).

[56] *S v Egglestone* supra (n 54) at para 23.

[57] Ibid.

[58] *S v Egglestone* supra (n 54) at para 27.

All of the above results in the act of sexual penetration being considered as rape having taken place. In this way, South African law protects the victim that is unable to protect themselves and respects the victim's lack of consent.

## 2.3. THE DEFINITION OF TORTURE

Section 3 of the Prevention of Combating and Torture of Persons Act provides that the crime constitutes 'any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person' in order to gain information from, intimidate or coerce the omission or commission of an action from, to punish or to discriminate against the victim 'or any other person' on any ground.[59] The definition goes on to provide that in order to constitute torture, the act must be performed by, at the instigation of, or with the consent of a public official acting in an official capacity.[60] Elements from this definition will be further discussed below, namely the different purposes for which an act can be considered as torture, as well as the public official element.

### 2.3.1. "FOR SUCH PURPOSES AS"

The Torture Act provides that torture consists of severe mental or physical pain and suffering either to the victim, or any other person.[61] By including the above, the Torture Act recognises the link between mental and physical torture; it recognises that physical torture may result in mental torture, something that can last for years after the physical incident took place, sometimes in the form of post-traumatic stress disorder.[62] Those upon whom the main and suffering are not directly inflicted, but who may have been witness to such torture, or who were closely linked to the act or victim are acknowledged, as well.[63]

[59] Section 3 (a) and (b) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[60] Section 3 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[61] Section 3 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[62] AC de C Williams and J van der Merwe 'The Psychological Impact of Torture' (2013) 7 *British Journal of Pain* 101 at 103.
[63] L Fernandez and L Muntingh 'The Criminalization of Torture in South Africa' (2016) 60 *Journal of African Law* 83 at 92.

The Torture Act provides further that an act of torture requires the 'severe pain and suffering' to inflicted for a number of purposes, as are listed above.[64] In accordance with the wording 'for such purposes *as*,' it appears that this is not an exhaustive list; this list of prohibited purposes may be added to in the future, whether through case law or through altering the legislation. This is especially true with regards to 'discrimination of any kind'.[65] Taking into consideration that South African law surrounding discrimination is both incredibly comprehensive, and yet still open to additions and alterations,[66] the element of discrimination in the crime of torture may include a great many things. It can be argued that discrimination, along with the other purposes listed above, may be inclusive of the various reasons for which sexual assaults take place.

### 2.3.2. DISCRIMINATION BY A PUBLIC OFFICIAL

The Torture Act provides that the act must involve a public official who is acting in an official capacity.[67] The term 'public official' is defined in the Torture Act as 'any person holding public office or purporting to exercise a public power or a public function in terms of any legislation'.[68]

In essence, this definition seems to indicate that a public official is someone who is part of the state or who is a representative thereof. a 'public official' may also be interpreted as one who is integrated within society as an authority enforcer; one who wields power over a group of people.[69] This may be widely interpreted to include members of the government, policemen, adjudicators, and traditional African chiefs or leaders, among many others who are granted public authority by South African legislation.[70]

Further, this definition makes it clear that the act of torture must be carried out by, instigated by, or with the consent of a public official who is acting in their *official capacity*. This means that private individuals or companies acting for private persons, or who are not acting with the

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[64] Section 3 (a) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[65] Section 3 (b) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[66] Section 1 (b) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (listed under 'prohibited grounds').
[67] Section 3 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[68] Section 1 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[69] Fernandez op cit (n 63) at 96.
[70] Ibid.

involvement of a public official may not necessarily be held responsible for the crime of torture.[71] Public officials who are not acting in an official capacity may not be held liable for the crime of torture either.[72] In this way, by specifying the *official capacity* requirement, the Torture Act effectively ensures that an act of torture will result in the state (or a representative thereof) being held liable. While this is incredibly necessary in order to hold public officials and the state accountable for their actions, and to ensure that they act within the bounds of the law, it may be said that the definition of a 'public official' is incredibly limiting.

If it is possible for public officials who are acting in their official capacity to carry out acts of torture, the same can certainly be said for private individuals or 'off duty' public officials. However, when this act is carried out by the latter, it is not considered as one of torture, but is rather classified as something else. To put this in other words, if the exact same act were to be carried out by a public official and by a private person (with no involvement of a public official) for such purposes as those listed in the definition of torture, only one act would be classified as torture; the weight, connotations and legal consequences that are attached to the term 'torture' will not be attributed to a heinous act committed by a private person. It may be argued that this limitation is somewhat of an oversight in the Torture Act. Once again, while it is necessary to have such a provision keeping the state and public officials in line, perhaps it should be considered that private persons acting of their own accord should be included among those who are capable of committing acts of torture, as envisioned by South African legislation.

It bears worth mentioning that both the Preamble and Section 2 (1) (a) of the Torture Act mentions the importance of upholding and giving effect to and carrying out its obligations under the Torture Convention.[73] It is clear that the definition of torture both in the Torture Convention and the Torture Act does not limit acts of torture to being carried out by public officials; an act constitutes torture when a public official has provided their consent or has knowledge of the act as well.[74] As such, it may be said that there exists a potential of a doctrine of due diligence being applied in certain instances in order for an act to constitute as torture.[75]

This seems to indicate that, despite the requirement of a public official being involved in the act in order for it to be considered as one of torture, the Torture Convention may consider

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[71] Fernandez op cit (n 63) at 97.
[72] Fernandez op cit (n 63) at 96.
[73] Preamble and Section 2 (1) (a) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[74] K Fortin 'Rape as Torture – An Evaluation of the Committee Against Torture's Attitude to Sexual Violence' (2008) 4 *Utrecht Law Review* 145 at 153.
[75] Fortin op cit (n 74) at 146.

harmful acts perpetrated by and upon private individuals to be the responsibility of the state to prevent.[76] It may be argued that this responsibility, despite not being specifically mentioned in the Torture Act, extends to the South African state as well. This will be further discussed below.

## 2.4. CONCLUSION

This Chapter has examined the definition of the crime of rape in a South African legal context. It has been found that the intention required for the crime of rape is that of *dolus eventualis*, a form of *mens rea* that requires the perpetrator to foresee the possibility that the victim might not consent but continues with the act despite this; the true subjective intention of the perpetrator is usually determined after considering the objective facts of the incident.

It has been found further, that with regards to the remaining two elements of the crime of rape (sexual penetration and lack of consent), there is a vast difference between consent and submission. When a woman consents to sexual penetration, there is submission, however, the converse is not always true; there may be submission (the appearance of consent), but no actual consent on the part of the victim. This may occur for a number of reasons, including the victim fearing further harm being done to her by the perpetrator. In these instances, the victim's appearance of consent will be considered invalid.

In relation to the crime of torture, it has been found that there is a requirement of severe pain and suffering being inflicted (for a number of purposes) by a public official. This Chapter has put forward that, considering its intention to give effect to the Torture Convention, the Torture Act may expand the scope of what constitutes the state's responsibility in terms of preventing acts of torture from those acts inflicted to public officials only, to those which are inflicted by private persons.

[76] Fortin op cit (n 74) at 153.

# 3. CHAPTER 3

## 3.1. INTRODUCTION

Awareness and the attitudes of society surrounding the crime of rape have evolved tremendously over the last few decades, and with it, rape law itself. This Chapter will explore a general history of the development of rape laws, followed by the international laws pertaining to rape and torture; whether or not states have an obligation under international law to protect against harmful acts committed by private individuals will be discussed. Thereafter, African regional laws will be discussed. This will be followed by a brief consideration of the relationship between rape and torture in certain other regions, namely the Inter-American legal region and the European Union legal region. The link between the laws that govern the crimes of rape and torture will be a running theme throughout.

## 3.2. A BRIEF HISTORY

For a very long time, under English law, rape was considered to be a crime against a man's property.[77] When an unmarried woman (or young girl) was raped, it was often considered to be a crime against the head of her household – usually her father – as the loss of her chastity brought dishonour on the family and reduced her value as a 'pure' bride.[78] Some laws provided that the perpetrator pay a fine to the household head,[79] while others see the rapist put to death.[80] In some cultures, the victim was forced to marry her perpetrator on account of preserving her family's honour;[81] different versions of this are still practiced in some societies today.[82] Most laws required that claims of rape had to be extra-marital; it was not possible for husbands to rape their wives.[83] This, too, is a modern day reality in some states.[84]

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[77] LN Henderson 'What Makes Rape a Crime' (1988) 3 *Berkeley Women's Law Journal* 193 at 219.
[78] CJ Smith 'History of Rape and Rape Laws' (1975) 6 *International Bar Journal* 33 at 34.
[79] Smith op cit (n 78) at 39.
[80] Ibid.
[81] Smith op cit (n 78) at 38.
[82] C Monayne 'Is *Ukuthwala* Another Form of 'Forced Marriage'?' (2013) 44 *South African Review of Sociology* 64 at 78.
[83] Smith op cit (n 87) at 38.
[84] Section 375 Exception 2 of the Criminal Law (Amendment) Act 2013.

Although rape laws slowly progressed through the years, it was only in the 1970s, in no small part due to the actions of feminist and women's liberation movements of that time, that women's human and reproductive rights were given more public importance.[85] It was during this time that the definitional and evidentiary requirements of rape became more comprehensive and less accommodating of the patriarchal view of the crime.[86] Unfortunately, despite the changes in the law, the patriarchal view of rape was still deeply ingrained into society. As such, while the rape reform laws that took effect in the 1970s had a significant impact on paper, it did not have the desired effect in reality; rape reports and convictions remained low.[87]

Since that time, many efforts have been taken to further develop laws against rape, and then have those changes and development reflected in society. This effort is ongoing, and likely will be for many years to come.

### 3.3. INTERNATIONAL LAW

The rights of women in the international sphere have developed dramatically from the adoption of the United Nations Charter.[88] Today, international law protects the rights of women, ranging from their rights to be seen as equal with men,[89] to their rights not to be discriminated against,[90] to the rights not to be abused or sexually assaulted.[91] Some of the international agreements that embody these rights – and to which South Africa is a state party to – will be further discussed below.

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[85] CC Spohn 'The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms' (1999) 39 *Jurimetrics* 119 at 121.
[86] Ibid.
[87] Spohn op cit (n 85) at 129.
[88] The United Nations Charter (1945); This was the founding document of the United Nations as we know it. It promoted equality and prohibited discrimination on the bases of sex, race, language, and religion.
[89] Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979).
[90] Ibid.
[91] United Nations Committee on the Elimination of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992) at para 24 (b); from here, this document will be referred to in text as 'General Recommendation 19'.

### 3.3.1. UNIVERSAL DECLARATION OF HUMAN RIGHTS

The UDHR was adopted in 1948 by the United Nations General Assembly.[92] It contains a list of fundamental human rights that is applicable throughout the international sphere. Although the UDHR does not specifically mention it, the right to be protected against rape and sexual assault may be interpreted and read into the international agreement, specifically into Article 5.[93]

Article 5 of the UDHR provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[94] Given that the wording the Article is so wide, it is highly possible that a number of rights are encompassed within it, including the rights of women to be protected from violence, rights to bodily integrity and dignity; all these rights should supposedly protect women from rape.[95] When a woman is subjected to the crimes of rape or sexual assault, the abovementioned rights are deeply violated. The Committee against Torture, the monitoring body of the Convention bearing the same title as Article 5, expands on this by providing that rape is considered as a form of torture and that states party to the Convention have an obligation to 'prevent and protect victims from gender-based violence, such as rape, [sexual assault, violence and abuse]'.[96] In other words, states are responsible for protecting the rights of its people.

Although the UDHR was the first, there came a number of human rights treaties, some of which attempt to address the issue of violence against women.[97] However, this attempt is made through gender neutral provisions, such as those providing for the rights to life, equality, freedom, and non-discrimination. Due to the matter never being specifically addressed, it is necessary for the right of women to be protected against violence and sexual assault to be interpreted and read into the wide provisions of international human rights agreements.

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[92] Universal Declaration of Human Rights (1948).
[93] Article 5 of the Universal Declaration of Human Rights (1948).
[94] Article 5 of the Universal Declaration of Human Rights (1948).
[95] K Donnah *Dealing with Rape as a Human Rights Violation under Gacaca Justice System* LLM (Pretoria) 2003 at 21.
[96] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) General Comment No. 2 at para 18.
[97] International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); International Convention on the Elimination of all Forms of Racial Discrimination (1965).

### 3.3.2. INTERNATIONAL HUMANITIARIAN LAW

One of the earliest and more explicit prohibitions of rape can be found under international humanitarian law, as a set of rules that aim to protect civilians and limit the damage and effects that armed conflict can have on a country and its people.[98] Specifically, this prohibition can be found in Article 27 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 12 August 1949, the first of the four Geneva Conventions which address humanitarian protection for civilians as well as for combatants during both international and non-international armed conflicts.[99] This prohibition was reiterated in an Additional Protocol to Geneva Convention IV in 1977.[100]

These provisions are incredibly important as, even though rape does not constitute a grave breach of Geneva Convention IV in terms of definition,[101] it may be argued that the need to protect women and women's rights to bodily integrity was recognised and acted upon.[102] Perhaps these provisions even laid the groundwork for the crime of rape to be considered as a form of torture.

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[98] International Committee of the Red Cross 'What is International Humanitarian Law?' *International Committee of the Red Cross*, 31 December 2014, available at *https://www.icrc.org/en/document/what-international-humanitarian-law*, accessed on 3 December 2018; JM Henkaerts and L Dowald-Beck 'Customary International Humanitarian Law Volume I: Rules' *International Committee of the Red Cross*, 2005, available at *https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf*, accessed on 4 December 2018 at page 323.

[99] Article 3 and Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949; from here, this document will be referred to in text as 'Geneva Convention IV'.

[100] Article 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); from here, this document will be referred to in text as 'Additional Protocol II'); D Blatt 'Recognising Rape as a Method of Torture' (1991) 19 *Review of Law and Social Change* 821 at 831.

[101] Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949; A Crowe 'All the Regard due to their Sex': Women in the Geneva Conventions of 1949, *Human Dreams Program,* December 2006, available at *http://hrp.law.harvard.edu/wp-content/uploads/2016/12/Anna-Crowe_HRP-16_001.pdf*, 4 December 2018 at page 11.

[102] CL Chiasson 'Silenced Voices: Sexual Violence During and After World War II', *The Aquila Digital Company* 2015, available at *https://aquila.usm.edu/cgi/viewcontent.cgi?article=1336&context=honors_theses,* accessed on 5 December at page 19; During armed conflict, even today, rape is used as a tool of discrimination.

### 3.3.3. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment gives effect to Article 5 of the UDHR, as indicated above.[103] Article 2 of the Torture Convention provides that states must take effective legal steps to 'prevent acts of torture in any territory under its jurisdiction'.[104] It further provides that states must ensure that a victim of torture within its jurisdiction has access to redress and adequate compensation, including rehabilitation.[105]

The term 'torture' is defined in the Torture Convention as:[106]

> '…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [obtaining information or a confession, punishment for an act committed, or suspected to have been, intimidation, coercion], or for any other reason based on discrimination of any kind [provided that the suffering is inflicted by, at the instigation of, or with the consent of] a public official or another person acting in an official capacity.'

This definition bears a great resemblance to the South African legal definition of 'torture' due to the latter being based off the former. As with the South African definition, the Torture Convention provides that an act will only be considered as torture if performed by, with the consent or knowledge of a public official 'acting in its official capacity'. Similarly, Article 16 of the Torture Convention provides the same for acts of 'cruel, inhuman or degrading treatment or punishment which do not amount to torture'.[107]

The above definition does not specify any *acts* whereby pain and suffering are inflicted upon the victim to such an extent that it might be considered as torture. However, over time, the definition of torture has been interpreted, developed and expanded upon by various sources.

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[103] The Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[104] Article 2 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[105] Article 14 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[106] Article 1 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[107] Article 16 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

One such example of development is the inclusion of the crime of rape as a form of torture in international law.

In 1998, the *Akayesu* case was issued by the International Criminal Tribunal for Rwanda.[108] This was the first of three cases which will be discussed below with regards to rape constituting a form of torture. In this case, not only was it provided that the crime of rape constituted a 'form of aggression',[109] but it was also recognised by the ICTR that rape and torture could be likened to one another.[110] According to the ICTR, both torture and rape constitute a 'violation of personal dignity' and can be used for 'such purposes as intimidating, degradation, humiliation, discrimination, punishment, control of [the] destruction of a person'.[111]

This was further added to by the International Criminal Tribunal for the Former Yugoslavia in the *Čelebići* case in November 1998, in which the crime of rape was explicitly recognised as a form of torture.[112] It further recognised the negative societal stigmas attached to the crime of torture, from which the victim would likely suffer as well.[113] After identifying the elements of torture in accordance with the ICTY Statute and the Torture Convention, the ICTY provided that where an incident of rape occurred between a public official and a detainee during a time of armed conflict, and it met the identified elements, the act would constitute torture.[114] The ICTY further provided that rapes which constituted torture were to be seen as war crimes as well as a grave breach of the Geneva Conventions.[115]

Later that year, in December 1998, the ICTY made use of a similar line of reasoning in the case of *Furundžija.*[116] This case found a Serbian commander guilty of the crime of torture in that he aided and abetted the crime of a detainee under his watch.[117] Once again, the ICTY

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[108] ICTR, *The Prosecutor v Jean-Paul Akayesu* (1998) ICTR – 96 – 4 – T, Trial Chamber Judgment of 12 September 1998; from here, the 'International Criminal Tribunal for Rwanda' will be referred to in text as 'the ICTR'.
[109] *The Prosecutor v Jean Paul Akayesu* supra (n 108) at 597.
[110] Ibid.
[111] Ibid.
[112] ICTY, *The Prosecutor v Zdravko Mucić aka 'Pavo', Hazim Delić, Esad Landžo aka 'Zenga', Zejnil Delalić* (1998) IT – 96 – 21 – T, Trial Chamber Judgment of 16 November 1998; from here, the 'International Criminal Tribunal for the Former Yugoslavia' will be referred to in text as the 'ICTY'.
[113] *The Prosecutor v Zdravko Mucić* supra (n 112) at 448.
[114] *The Prosecutor v Zdravko Mucić* supra (n 112) at 496.
[115] *The Prosecutor v Zdravko Mucić* supra (n 112) at 943; S Fulton 'Redress for Rape: Using International Jurisprudence on Rape as a form of Torture or other Ill-Treatment' *Redress* October 2013, available at *https://redress.org/wp-content/uploads/2017/12/final-rape-as-torture1.pdf*, accessed on 5 December 2018 at page 20.
[116] ICTY, *The Prosecutor v Anto Furundžija* (1998) Trial Chamber Judgment of 10 December 1998.
[117] ICTY, *The Prosecutor v Anto Furundžija* supra (n 116) at 183.

recognised the link between rape and torture in the physical and psychological damage they cause.[118]

Taking the above into consideration, it can be said that international case law, specifically those judgments being issued from the ICTR and the ICTY, deems the crime of rape as a form of torture. However, this is only so when the act of rape meets the requirements of torture, as are set out in the case of *Čelebići,* which require the act to be carried out by, or with the knowledge or consent of a person of authority.[119]

After a decade, in 2008, a further development was made when the Committee against Torture released General Comment No. 2 of the Torture Convention.[120] General Comment 2 provided that if a person in a position of authority acting in an official capacity, knows or reasonably believes that 'acts of torture … are being committed by non-state officials or private actors',[121] they must act so as to 'prevent, investigate, prosecute and punish such perpetrators'.[122] Failure to do so will result in the person of authority being considered as complicity to the crime of torture as 'indifference or inaction' will be considered as akin to permission or encouragement.[123] General Comment 2 provided further that the crime of torture includes 'gender-based violence such as rape, domestic violence, female genital mutilation, and trafficking'.[124]

The addition of General Comment 2 shows tremendous progression in terms of how the crime of rape is being thought of in the international sphere. General Comment 2 is classified as soft law and, as such, it is not strictly binding upon state parties.[125] However, it does carry weight in clarifying and informing certain sections of the main international agreement.[126] It appears that the inclusion of rape as a form of torture lends insight into the gravity of how

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[118] ICTY, *The Prosecutor v Anto Furundžija* supra (n 116) at 95 and at 170.
[119] *The Prosecutor v Zdravko Mucić* supra (n 112) at 496.
[120] The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by State Parties (2008).
[121] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by State Parties (2008) at para 18.
[122] Ibid.
[123] Ibid.
[124] Ibid.
[125] M Barelli 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *The International and Comparative Law Quarterly* 957 at 959.
[126] United Nations Human Rights Office of the High Commissioner 'Human Rights Treaty Bodies – General Comments' *OHCHR* 1996 – 2020, available at *https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx*, accessed on 8 January 2019.

heinous the crime of rape is.[127] It serves as an encouragement to states to take more extensive and positive precautions in preventing further acts of torture in the form of rape and other gender-based violence.[128] Further, it not only emphasises the need for states to monitor and hold their public officials accountable for their actions, but it urges states to take a more proactive stance in decreasing the amount of rapes that take place.[129]

It is possible that this line of thinking reflected above with regards to General Comment 2 stems from the definition of torture itself. As mentioned above, the definition of torture does allow for acts of torture to be carried out by non-state or private actors, so long as the act was instigated by, consented to or acquiesced by a public official.[130] It may be argued that from this, a due diligence doctrine may be applied and in so doing, the state may be held for 'its failure to protect individuals from human rights abuses by private actors'.[131] Essentially, if it is applied, much like Article 15 of General Comment 2 above, this would place a positive obligation upon the state to prevent acts of harm from being conducted by private individuals, or otherwise be held accountable for failure to comply with international legislation.[132]

In the matter concerning *Hajrizi Dzemajl et al v. Serbia and Montenegro*,[133] the Committee Against Torture provided that states have an obligation to prevent harm from being conducted by private actors.[134] This case involved sexual assault and misconduct. Although this finding was based off of the specific facts of the matter, the judgment provides no indication that a more general obligation, with regards to different crimes that may amount to torture, is not owed and that it is applicable to all states.[135] It is put forward that there is no reason why a general obligation should not be applied with regards to the state having the duty to practice due diligence and prevent private actors from conducting harm upon others, including in the form of rape. [136]

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[127] FD Gaer 'Rape as a Form of Torture: The Experience of the Committee Against Torture' (2012) 15 *City University of New York Law* Review 293 at 296.
[128] Ibid.
[129] Gaer op cit (n 127) at 297.
[130] Fortin op cit (n 74) at 153.
[131] Fortin op cit (n 74) at 153; Gaer op cit (n 127) at 297; I Cherneva 'Recognising Rape as Torture: The Evolution of Women's Rights Legal Protective Techniques' (2011) 6 *Intercultural Human Rights Law* Review 325 at 332.
[132] Cherneva op cit (n 131) at 335.
[133] CAT, *Hajrizi Dzemajl et al. v Yugoslavia,* CAT/ C/ 29/ D/ 161/ 2000, United Nations Committee Against Torture, 2 December 2002.
[134] *Hajrizi Dzemajl v Yugoslavia* supra (n 133) at para 8.9.
[135] Fortin op cit (n 74) at 156.
[136] Ibid.

As such, it can be said that the Torture Convention, through an interpretation of its definition, places a responsibility upon the state to prevent and prohibit acts of torture and ill-treatment in all contexts, including instances involving the infliction of harm on and by private persons where the state failed to intervene. This may be an indication that while, on a more literal level, the definition of torture pertains to the acts of public officials or any other person acting 'under the colour of law', the Torture Convention may give rise to the more onerous task of states taking responsibility for the acts of private individuals. This is incredibly important regarding the crime of rape potentially being considered as a form of torture.

More often than not, apart, perhaps, from during times of conflict, the crime of rape usually takes place between private individuals rather than being perpetrated by public officials, thought these occurrences do take place. If the definition of torture places the responsibility upon states to prevent acts of harm between private persons, it is put forward that the state has an obligation to take steps in prohibiting and preventing the crime of rape from taking place in the private sphere. Unlike General Comment 2, the obligations under the Torture Convention are not considered as soft law, but as a binding agreement.

### 3.3.4. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Attitudes towards women's human rights and the emphasis on states to protect those rights expands far beyond the Torture Convention. The CEDAW is described as the 'international bill of rights for women'.[137] Under this Convention, however, it appears that there is only one provisions directly linked to a manifestation of the protection of women against violence. This provision provides for the protection of women against human trafficking and exploitation of prostitution.[138]

The CEDAW Committee recognised this vast exclusion of rights pertaining to the protection of women from violence and has, subsequently, adopted a number of General Recommendations pertaining to the matter. Due to General Recommendations not being signed

[137] United Nations Women 'Convention on the Elimination of all Forms of Discrimination Against Women' *Women Watch,* 31 December 2007, available at *http://www.un.org/womenwatch/daw/cedaw/*, accessed on 15 November 2018.
[138] Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women (1979).

and ratified by states, they are not considered as an actual treaty; however, they are considered as authoritative additions to CEDAW.[139] The General Recommendations allow the Committee to comment on matters that are not specifically mentioned in CEDAW, such as the issue of violence against women and gender-based violence.

### 3.3.4.1. GENERAL RECOMMENDATION 19

General Recommendation 19 was adopted in 1992; it was preceded by General Recommendation 12 which called upon states to share and report with regards to their legislation protecting women from violence.[140] General Recommendation 12 required states to send in reports regarding violence against women and the laws that governed this issue in each country.[141]

After reviewing the state reports that were available to them, the CEDAW Committee found that many states did not seem to have adequate laws and mechanisms to combat gender-based discrimination or violence against women[142]. As a result, General Recommendation 19 was drafted. Being more strongly worded and comprehensive than its predecessor, General Recommendation 19 aimed to urge states in undertaking positive and effective actions that would prevent and eliminate violence against women.[143]

Much like the Torture Convention, Article 8 of General Recommendation 19 specifically addresses the document's applicability to 'public authorities' (in other words, the state, or those who are acting on behalf of and representing the state).[144] Article 9 goes further to provide that states may be found liable for private acts of violence against women if it is found that sufficient

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[139] M Kanetake 'United Nations Rights Treaty Monitoring Bodies Before Domestic Courts' (2017) 67 *International and Comparative Law Quarterly* 201 at 219.

[140] United Nations Committee on the Elimination of Discrimination Against Women General Recommendation No. 12: Violence Against Women (1989) at page 1; from here, this document will be referred to in text as 'General Recommendation 12'.

[141] United Nations Committee on the Elimination of Discrimination Against Women General Recommendation No. 12: Violence Against Women (1989) at page 1.

[142] Article 4 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992).

[143] Article 24 (a) of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992); NA Englehart 'CEDAW and Gender Violence: An Empirical Assessment' (2014) 2014 *Michigan State Law Review* 265 at 266.

[144] Article 8 of the United Nations Committee on the Elimination of all forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992).

and effective preventative measures have not been taken in regard to this.[145] These provisions are incredibly important as they emphasise the importance of state accountability when it comes to acts of gender-based violence against women, specifically in instances where the perpetrator is a private person.

In the same way that General Recommendation 19 condemns acts of violence against women and places and obligation on the state to prevent such acts from taking place, so it also provides that women should be protected from acts of torture, 'cruel, inhuman or degrading treatment or punishment' in both the public and private spheres.[146] From this, it may be said that a link can be drawn between the crimes of rape (and other gender-based violence against women) and torture under General Recommendation 19, albeit an indirect one. General Recommendation 19 essentially addresses the responsibilities that states have in preventing and prohibiting violence against women.[147] Considering that the crime of torture was included under those 'rights and freedoms' of women that should not be infringed, it may be argued that General Recommendation 19 appears to equate the crimes of torture and gender-based violence against women.

A year later, in 1993, the Declaration of Violence against Women was adopted by the General Assembly of the United Nations.[148] Although this is classified as soft and non-binding law,[149] it was the first international human rights instrument to explicitly address violence against women in both the public and private spheres.[150] However, not much difference can be seen between DEVAW and General Recommendation 19 with regards to the link between rape and torture.

The crime of rape forms part of the term 'violence against women',[151] which is condemned and prohibited under DEVAW;[152] the right not to be subjected to torture is listed under the

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[145] Article 9 of the United Nations Committee on the Elimination of all forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992).
[146] Section 24 (a) of the United Nations Committee on the Elimination of all forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992); Englehart op cit (n 143) at 267.
[147] Englehart op cit (n 143) at 266.
[148] United Nations General Assembly Declaration on the Elimination of Violence Against Women, A/RES/48/104 (20 December 1993), from here, this document will be referenced in text as 'DEVAW'.
[149] UA O'Hare 'Realizing Human Rights for Women' (1999) 21 *Human Rights Quarterly* 364 at 379.
[150] O'Hare op cit (n 149) at 365.
[151] Article 2 of the United Nations General Assembly Declaration on the Elimination of Violence Against Women, A/ RES/ 48/ 104 (20 December 1993.
[152] Article 4 of the United Nations General Assembly Declaration on the Elimination of Violence Against Women, A/ RES/ 48/ 104 (20 December 1993.

protected rights that all women should be afforded.[153] The two are never directly linked with one another.

Although DEVAW came into effect before cases such as *Akayesu* and *Čelebići*, it is not to say that the connections between rape and torture had not been drawn before 1998. Considering that the United Nations, a body with a high amount of influence in the international community, had the opportunity to address this, but did not, it may be argued that this was a major shortfall on their part.

#### 3.3.4.2. GENERAL RECOMMENDATION 35

Approximately 25 years after General Recommendation 19 was adopted, in 2017, General Recommendation 35 was adopted by the CEDAW Committee as an updated version of the former.[154] The CEDAW Committee recognised that, despite the great progression of laws against gender-based violence in states throughout the international sphere, the reality reflected something different.[155] Many states, even after the adoption of General Recommendation 19, had inadequate laws in place – and sometimes, poor implementation thereof – pertaining to gender-based violence, and more specifically, rape.[156] As a result of this, the CEDAW Committee built on its message in General Recommendation 19 by placing an emphasis on the importance of states throughout the international sphere making an effort to develop a legal framework pertaining to the prevention of gender-based violence, specifically relating to violence against women, and implementing those laws effectively.[157]

[153] Article 3 of the United Nations General Assembly Declaration on the Elimination of Violence Against Women, A/ RES/ 48/ 104 (20 December 1993).
[154] United Nations Committee on the Elimination of all Forms of Discrimination against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017); from here, this document will be referred to in text as 'General Recommendation 35'; Note that General Recommendation 35 is not considered as a replacement, but rather as an update of General Recommendation 19 – therefore, they should be read in conjunction with one another.
[155] Article 6 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).
[156] Article 101 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).
[157] Articles 29 – 33 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).

General Recommendation 35 reiterates that gender-based violence infringes upon the right of women not to be subject to acts of torture.[158] However, unlike General Recommendation 19, it goes on to recognise that there is a direct link between rape and torture, providing that the former is a form of the latter.[159] This link is informed by the 2016 Special Rapporteur report pertaining to torture.[160] This recognition is not qualified by the requirement of the involvement of a public official, as is the strict definition of the crime of torture. Rather, General Recommendation 35 places an obligation on the state to intervene in instances of rape or domestic violence, among others.[161] It is once again provided that states are responsible for carrying out due diligence to stop or prevent private actors from carrying out the crime of rape.[162]

The progress that has been made with regards to the development of laws protecting women from rape is tremendous. This is clear merely by looking at the written domestic laws of several countries, South Africa included. However, the fact that the CEDAW Committee felt the need to emphasise the same message twice – that states need to start taking responsibility not only for the written laws, but for the actual rapes that take place – is somewhat worrying. It may be interpreted to indicate that a body of the international community recognises that law is not enough, even over two decades after General Recommendation 19 was released. It may be argued that by listing gender-based violence as a form of torture, an attempt was made by the CEDAW Committee, not unlike the Committee against Torture with General Comment 2, to draw attention to the gravity and heinousness of the various crimes that form part of gender-based violence.

From the above, it can be said that CEDAW along with its General Recommendations place an obligation on states to prevent and prohibit acts of rape and other gender-based violence against women. Additionally, it is clear, especially from General Recommendation 35, that the

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[158] Article 15 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).

[159] Article 16 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).

[160] United Nations Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/ HRC/ 31/ 57 (5 January 2016) at para 51.

[161] Article 24 of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).

[162] Article 24 (b) of the United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).

link between the crimes of rape and torture has been developed significantly in international law over time. Some of these international agreements have informed regional and domestic laws pertaining to these issues as well.

## 3.4. AFRICAN REGIONAL LAW

It can be said that the African and Western notions of laws and approaches to human rights are different based on culture and history, among other things. For this reason, some argue, the application of Western laws in African states does not always work.[163] The regional laws that will be discussed below appear to attempt to find a middle ground between Western human rights and African traditions, values and culture. The regional law that will be discussed below includes the African Charter on Human and Peoples' Rights, also known as the Banjul Charter,[164] as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol.[165]

### 3.4.1. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The Banjul Charter was adopted in 1981 and it is considered to be the foundational human rights document for the African continent.[166] This regional agreement, for the most part, contains gender-neutral language. The only specific mention of women can be found in Article 18 which provides that states 'shall ensure the elimination of every discrimination of women …'.[167]

Apart from Article 18, the main gender-neutral provisions of the Banjul Charter that protect women from discrimination include the rights for all persons to be protected from non-

[163] C Nicholson 'Some Preliminary Thoughts on a Comparative Law Model for Harmonisation of Laws in Africa' (2008) 14 *Fundamina* 50 at 52.
[164] The Organisation of African Unity (now African Union) African Charter on Human and Peoples' Rights CAB/ LEG/ 67/ 3 rev. 5, 21 I. L. M. 58 (1982) (27 June 1981); from here, this document will be referenced in text as 'the Banjul Charter'.
[165] The African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003); from here, this document will be referenced in text as 'the Maputo Protocol'.
[166] C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State Law Review* 679 at 685.
[167] Article 18 (3) of the Organisation of African Unity (now African Union) African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982) (27 June 1981).

discrimination,[168] as well as equality before the law.[169] the Banjul Charter also provides that it will 'draw inspiration' from other international human rights instruments.[170] This seems to indicate that the provisions of the Banjul Charter should not be read in isolation, but rather as forming part of the larger international human rights law context instead. In other words, it appears that regional law, not unlike international law, provides that the Banjul Charter should be read and interpreted, in part at least, with the aid of other international human rights agreements such as CEDAW, the Torture Convention and the UDHR.

There is a possibility, therefore, given the wide nature of the provisions, that although they are not explicitly mentioned throughout the regional agreement, the crimes of rape and torture may be interpreted to be included under the right to be protected against discrimination. To shed some light on this argument: the crime of torture may be committed by the perpetrator for purposes of discrimination; gender-based violence against women is a form of discrimination itself in that the crime is, essentially, violence inflicted upon women *because* they are women.[171]

However, this link is incredibly indirect. Unless an incentive for rape and torture to be explicitly interpreted into the Banjul Charter becomes apparent, there is no reason to believe that the African Union would expressly provide that this is so.

### 3.4.2. PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA

The Maputo Protocol was adopted in 2003 with the aim of expanding on women's rights in Africa.[172] It is often praised for being progressive and forward looking having been described as a 'landmark instrument' regarding women's rights in Africa,[173] the Maputo Protocol

[168] Article 2 of the Organisation of African Unity (now African Union) African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982) (27 June 1981)
[169] Article 3 of the Organisation of African Unity (now African Union) African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982) (27 June 1981).
[170] Article 60 of the Organisation of African Unity (now African Union) African Charter on Human and Peoples' Rights, CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982) (27 June 1981).
[171] L Gormley *Women's Access to Justice for Gender-Based Violence: A Practitioner's Guide* 12ed (2016) 91.
[172] F Banda 'Blazing a Trail: the African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal of African Law* 72 at 72.
[173] KSA Ebeku 'A New Dawn for African Women – Prospects of Africa's Protocol on Women's Rights' (2004) 16 *Sri Lanka Journal of International Law* 83 at 85.

provides for the rights of gender equality and non-discrimination,[174] as well as for women's sexual and reproductive rights.[175] It also provides for the protection of women from violence, including sexual violence, in both the public and private spheres.[176]

The term 'violence against women' is described in the Maputo Protocol as being any act – or threat thereof – perpetrated, including the deprivation of 'fundamental freedoms', which causes harm to women in the public and private spheres.[177] The crime of rape, or 'unwanted or forced sex' is encompassed in this definition as well.[178]

Article 3 provides for the right to dignity; under this right, women are protected against sexual and verbal violence.[179] Article 4 of the Maputo Protocol goes on to provide for the protection of the right to integrity; once again, the protection of women against sexual violence is accounted for, whether in private or in public life.[180] The inclusion of the term 'public or private life' indicates the spheres in which women can experience violence: within the family, the community, or by the state.[181] It may be argued that this means that liability for the crime of rape, though named as 'unwanted or forced sex' may be attributed to the state, whether the act was conducted by, instigated by, or consented to by a person of authority, or there was a failure to intervene and prevent the act from taking place in the private sphere.[182] In essence, much like the Torture Convention and the General Recommendations of CEDAW, the Maputo Protocol seems to place obligations on the state to reduce and prevent acts of violence and discrimination against women.[183] Additionally, and importantly, it should be noted that the

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[174] Article 2 (1) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[175] Article 14 (1) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[176] Articles 3 (4) and 4 (2) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[177] Article 1 (j) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[178] Article 4 (2) (a) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[179] Article 3 (4) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[180] Article 4 (2) of the African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (11 July 2003).
[181] Banda op cit (n 173) at 79.
[182] R Manjoo 'State Responsibility to Act with Due Diligence in the Elimination of Violence Against Women' (2013) 2 *International Human Rights Law Review* 240 at 252.
[183] Manjoo op cit (n 182) at 247.

Maputo Protocol acknowledges the states' responsibility to protect and prevent acts from violence from taking place by or against private individuals.[184]

With regards to a connection with the crime of torture, the Maputo Protocol does not explicitly mention the latter, in any context. However, if, like the Banjul Charter, the Maputo Protocol was meant to have been read within the context of the agreements of the broader international sphere, there may be room for a connection between the two crimes to be read in.

## 3.5. 'WESTERN REGIONAL LAW'

As mentioned above, African and Western approaches to the law are different in ways that relate to values, culture, tradition and history, among other things. In reference to what has already been discussed, it appears that the international human rights agreements seem to draw from each other in terms of developing their jurisprudence. Such can be said for the African regional agreements, as were discussed above, in that they attempted to find something of a middle ground between African and Western culture and law.[185] Such may also be said for certain aspects of the European Union and the Inter-American regional legal systems. These two systems will be further discussed below in order to determine whether similarities exist between them with regards to the crimes of rape and torture.

### 3.5.1. 'WESTERN' LEGAL SYSTEMS AND TORTURE

With regards to the crime of torture, the European Court of Human Rights appears to have been using the element of the degree of pain and suffering inflicted in order to differentiate whether the incident may be classified as an act of ill treatment, or as an act of torture (which connotates a heavier stigma than the former).[186] The element of 'pain and suffering' is determined on a spectrum of factors including the 'duration of the treatment, its physical or

[184] Manjoo op cit (n 182) at 252.
[185] Manjoo op cit (n 182) at 252; for example, the Maputo Protocol.
[186] S Fulton 'Redress for Rape: Using International Jurisprudence on Rape as a form of Torture or other Ill-Treatment' *Redress* October 2013, available at *https://redress.org/wp-content/uploads/2017/12/final-rape-as-torture1.pdf*, accessed on 5 December 2018 at page 12.

mental effects and, in some cases, the age, sex and state of health of the victim …'.[187] From case law, it is rather clear that the European Court does not rule incidences as 'torture' lightly.[188] However, they conceded that, due to the fact that the law is always susceptible to change, crimes that have been classified as something other than torture 'could be classified differently in future'.[189]

In relation to the 'public official' element of the definition of torture, the European Court of Human Rights has shown that they are willing to rule acts *not* inflicted by, or with the involvement of a public official as torture.[190] However, this finding has not yet been made in cases involving rape, domestic violence, or forms of gender-based violence. The European Court has instead opted to classify these crimes as 'ill treatment' (which consists of 'other cruel, inhuman or degrading treatment or punishment', as referenced in the Torture Convention).[191]

The Inter-American Court of Human Rights appears to have a more traditional approach to classifying crimes as torture. This is illustrated by the majority in the case of *Cottonfields*, where the incident in question was not referred to as torture on the basis of there being no involvement of a public official.[192] The minority in this matter expressed a criticism in relation to this providing that classifying an act as torture, or as other ill treatment, should be decided based upon the 'severity of the suffering inflicted'.[193]

Although the Inter-American and European systems may differ in approaches, they have both made a distinction between torture and ill treatment. This is in contrast to the African Commission on Human and Peoples' Rights which does not make a clear distinction between torture and other ill treatment.[194]

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[187] ECHR, *Selmouni v France* (1998) Judgment of 14 April 1998 at para 100.
[188] Ibid.
[189] *Selmouni v France* supra (n 187) at para 101.
[190] ECHR, *Antropov v Russia* (2009) Judgment of 29 January 2009 at paras 38 – 46.
[191] ECHR, *Opuz v Turkey* (2009) Judgment of 9 June 1998 at para 161.
[192] Concurring opinion of Judge Celia Media Quiroga, IACTHR, *Cottonfields Case* (2009) 16 November 2009, at para 9.
[193] *Cottonfields Case* supra (n 192) at para 3.
[194] N Rodley and M Pollard *The Treatment of Prisoners under International Law* (2011) 115; S Fulton 'Redress for Rape: Using International Jurisprudence on Rape as a form of Torture or other Ill-Treatment' *REDRESS,* October 2013, available at https://redress.org/wp-content/uploads/2017/12/final-rape-as-torture1.pdf, accessed on 19 June 2019 at 13.

### 3.5.2. ‘WESTERN’ LEGAL SYSTEMS AND RAPE AS TORTURE

Though they may be scarce occurrences, the crime of rape has been classified as torture in a number of cases, as found by the regional bodies discussed above. In 1996, the Inter-American Commission on Human Rights found that if the rape fulfilled three requirements as set out by the definition of ‘torture’ – ‘an intentional act [which resulted in pain and suffering being inflicted] on a person; committed with purpose; and committed by or at the instigation of a public official’ – it would be classified as torture.[195] This matter concerned the rape of a school teacher conducted by members of the Peruvian Army.[196] As the incidence had satisfied all of the abovementioned criteria, the Inter-American Commission found that the rape had constituted torture.[197]

The same was found by the European Court of Human Rights,[198] as well as the African Commission on Human and Peoples’ Rights,[199] in 1997 and 2000, respectively. The Committee against Torture followed suit soon after in 2006, where it was found that ‘sexual abuse by the police’ may be referred to as torture.[200]

However, this is not to say that every rape or sexual assault committed by a state or public official will be classified as torture. On the contrary. This may be due to the fact that the elements of rape or sexual assault are so difficult to prove; therefore, the crime will likely have a higher threshold of proof required than other forms of torture or ill treatment. For example, the Inter-American Commission on Human Rights, in the matter of *Ortiz v Guatemala*, found that the allegation of rape made by the complainant could not be substantiated by physical evidence.[201] A few years thereafter, the European Court of Human Rights found that ‘the allegation [of rape] was made too late for it to be provide or disproved by medical evidence’.[202]

Unfortunately, it may be said that the above is not unlike the attitude toward crimes of rape in South Africa.[203]

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[195] IACHR *Raquel Martí de Mejía v Perú* (1996) Judgment of 1 March 1996.
[196] *Raquel Martí de Mejía v Perú* supra (n 195) at para 16.
[197] *Raquel Martí de Mejía v Perú* supra (N 195) at para 217.
[198] ECHR *Aydin v Turkey* (1997) Judgment of 25 September 1997 at paras 83 – 85.
[199] ACHPR *Malawi African Association and Others v Mauritiania* (2000) Judgment of 11 May 2000 at paras 117 – 118.
[200] CAT, *VL v Switzerland* (2006) Judgment of 20 November 2006 at para 8.10.
[201] IACHR *Dianne Ortiz v Guatemala* (1996) Judgment of 16 October 1996.
[202] *Selmouni v France* supra (n 187) at para 90.
[203] D Smythe *Rape Unresolved: Policing Sexual Offences in South Africa* (2015) at 87.

## 3.6. CONCLUSION

This Chapter has examined the international and regional laws regarding the crime of rape and torture applicable to South Africa by discussing provisions in the UDHR, international humanitarian law, the Torture Convention and CEDAW under international law; the Banjul Charter and Maputo protocol were examined under African regional law, as well as the European Union and Inter-American regional legal systems. It has been found that the provisions of the UDHR and Geneva Convention IV, likely due to having been drafted and adopted in the 1940s, almost immediately after the end of World War II, seem to focus on human rights in a more general and gender-neutral light. For this reason, the crime of rape and the issue of violence against women was not heavily elaborated on, resulting in the need for women's rights to be interpreted and read into these provisions at a later stage. The right to be protected against acts of torture (and other cruel, inhuman or degrading treatment or punishment), however, has been incorporated into a number of international human rights agreements; this right primarily stems from Article 5 of the UDHR.

Further, this Chapter has found that, with regards to the Torture Convention, there is no direct link mentioned between the crimes of rape and torture. This link was only explicitly recognised in international case law, as well as in General Comment 2, a non-binding document that informs provisions included in the Torture Convention, both of which emerged years after the adoption of the Torture Convention in 1984. This Chapter has also found that, importantly, the Torture Convention places an obligation on the state, not only to prohibit and prevent acts of torture from taking place (specifically in terms of the definition requiring the involvement of a public official), but it also has an obligation to intervene in acts of harm that take place between private persons.

CEDAW, while known as the 'international bill of rights for women', failed to address the issue of violence against women. As a result, this matter was addressed through a number of General Recommendations, in which rape and torture may be interpreted to be indirectly linked to one another. Eventually, under General Recommendation 35 in 2017, the CEDAW Committee explicitly recognised that the crime of rape may constitute a form of torture under certain circumstances. Additionally, it should also be noted that CEDAW, like the Torture Convention, places an obligation on states to prevent and prohibit acts of gender-based violence against private individuals.

In terms of African Regional Law, this Chapter has found that the Banjul Charter, much like the UDHR, contains mostly gender-neutral provisions, the only mention of women falling under the protection of women from discrimination. The Maputo Protocol expanded on women's rights and the need for women to be protected from all forms of violence, including sexual violence. Here, too, states have an obligation to protect private individuals from harm and gender-based violence against women. However, with regards to a connection between rape and torture, apart from tasking states with considering other international human rights instruments and provisions with regards to women's rights. Both of these regional instruments fail to mention the crime of torture or link it with the crime of rape.

The 'Western' regional laws (namely the European Union and the Inter-American legal systems) were considered. This Chapter found that these two legal systems have made a distinction between 'torture' and 'other ill treatment'; this is in comparison to African regional law, in which this distinction has not been made. Furthermore, it has been found that it is possible for the crime of rape to constitute torture in the international sphere. However, the regional bodies and courts are reluctant in this regard due to the higher threshold of proof required to show that there has been a rape. It may be argued that this is part of the issue concerning law enforcement and not believing the allegation of rape from the victim.

Finally, it should be noted that the Committee against Torture, the CEDAW Committee, as well as the African regional written laws (to an extent) have brought up and recognise that states should bear a responsibility towards actively preventing these crimes of rape and other sexual harassment from taking place among private individuals. This is significant in that it implies that where states do not actively make efforts and take positive steps in preventing and stopping the crime of rape from taking place in the private sphere, among private individuals, they may be in contravention of international law.

# 4. CHAPTER 4

## 4.1.INTRODUCTION

Law surrounding women's human rights in South Africa has developed a great amount, especially since the adoption of the South African Constitution in 1996.[204] However, despite the tremendous legal developments, it can be said that the South African reality does not always reflect the state's on-paper legislation.

This Chapter will discuss current South African law in relation to the protection of women from acts of rape and torture. It will explore whether South Africa is under a legal obligation to reduce and prevent the amount of rapes that take place in the country. The pieces of legislation that will be considered include the Constitution, the Torture Act, the Sexual Offences Act and the Domestic Violence Act. This Chapter will discuss whether rape may be considered as a form of torture in South Africa. Finally, this Chapter will discuss whether the state of South Africa, through its law and the implementation of such law, is in violation of its obligations under international treaties.

## 4.2.THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The Constitution – the supreme and overarching law of South Africa – including its Bill of Rights, is often described as one of the 'most progressive and far reaching domestic human rights documents' in the world.[205] The rights in the Bill of Rights are interconnected; wen individual provisions are being interpreted, they should not be read in isolation, but rather as relating to other rights of the Constitution as well.[206] This is not dissimilar to the way in which international agreements may be seen as interconnected.

The Bill of Rights is largely gender neutral and therefore, apart, perhaps, from the right to reproductive health care,[207] there is no specific mention of the protection of women's rights in

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[204] The Constitution of the Republic of South Africa, 1996.
[205] P de Vos 'Introduction to South Africa's 1996 Bill of Rights' (1997) 15 *Netherlands Quarterly of Human Rights* 225 at 225.
[206] De Vos and Freedman op cit (n 14) at 30.
[207] Section 27 (1) (a) of the Constitution of the Republic of South Africa, 1996.

Chapter 2 of the Constitution. As such, the protection of women against violence, rape and torture are encompassed in the rights to equality and non-discrimination,[208] human dignity,[209] and freedom,[210] among others.[211] These provisions are arguably connected with most rights throughout the Constitution.

Section 9 of the Constitution provides that all persons are equal before the law and that everyone should be protected by it.[212] Section 9 (3) goes on to provide that no person should be unfairly discriminated against on a number of grounds, including gender.[213] Further, Section 9 is given expression by the Promotion of Equality and Prevention of Unfair Discrimination Act; Section 8 of this Act specifically provides for the protection of women from gender-based violence.[214]

As mentioned above, both CEDAW and DEVAW recognise gender-based violence against women, including rape, as constituting a form of gender discrimination.[215] This was reiterated by the Constitutional Court in the case of *Carmichele v Minister of Safety and Security*;[216] the court went further to provide that the state has a duty to prevent gender-based violence against women in both international and domestic law.[217] In recognising the link between discrimination and rape – along with other forms of gender-based violence against women – it becomes clearer as to how women's rights should be protected, not only by South African legislation, but by the state as well.

Section 10 of the Constitution provides that all persons have the right to respect and protection of their human dignity.[218] Human dignity has been described as the 'incalculable' and 'intrinsic worth' of a person with the right to be treated with 'respect and concern'.[219] In essence, to infringe on a persons' human dignity would be to subject them to 'abusive,

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[208] Section 9 of the Constitution of the Republic of South Africa, 1996.
[209] Section 10 of the Constitution of the Republic of South Africa, 1996.
[210] Section 12 of the Constitution of the Republic of South Africa, 1996.
[211] Sections 23 (1) (c), (d), (e), and (2) (b) of the Constitution of the Republic of South Africa, 1996.
[212] Section 9 (1) of the Constitution of the Republic of South Africa, 1996.
[213] Section 9 (3) of the Constitution of the Republic of South Africa, 1996.
[214] Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[215] United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No. 19: Violence Against Women (1992) at para 1; Articles 2 (b) and 4 of the United Nations General Assembly Declaration on the Elimination of Violence Against Women, A/ RES/ 48/ 104 (20 December 1993).
[216] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 62.
[217] Ibid.
[218] Section 10 of the Constitution of the Republic of South Africa, 1996.
[219] De Vos op cit (n 205) at para 328.

degrading, humiliating or demeaning' conduct,[220] a description that matches the crime of rape. in the matter concerning *S v Chapman*, the Supreme Court of Appeal provided that all women are entitled to the right to dignity, and that the crime of rape constitutes a severe invasion of that right.[221] The court went on to provide that the quality and enjoyment of women's lives is severely diminished by acts of gender-based violence against women.[222]

Section 12 of the Constitution provides that 'everyone has the right to freedom and security of the person'.[223] Included in 'freedom and security' are the rights to be protected from violence 'from either public or private sources',[224] torture,[225] and inhuman or cruel treatment.[226] Section 12 further provides for the right to psychological and bodily integrity – the right of a person to have control over their body.[227] In the context of the crime of rape, during which the victim does not always have sufficient physical control over her body, Section 12 is incredibly important.

It may be argued that the prohibitions listed in Section 12 of the Constitution are wide enough that sexual violence and rape may be included within their scope. This is provided for by the Supreme Court of Appeal in the case concerning *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)*.[228] Here, the court found that the crimes of rape and sexual assault on women constitutes an infringement of the right to freedom and security of the person and that the state is responsible for taking positive steps in preventing such crimes.[229] The responsibility that the court places on the state in this matter with regards to the prevention of violence against women should be noted; by providing that the state has the above obligation, the court recognises the importance of international law and its applicability in South African domestic law.

Section 39 (1) (b) of the Constitution, which provides that an interpretation of the Bill of Rights should take international law into consideration, further substantiates this view.[230]

[220] *S v Williams and Others* 1995 (3) 632 at 17; de Vos, op cit (n 205) at 457.
[221] *S v Chapman* 1997 (3) 632 at 17; de Vos op cit (n 205) at 457.
[222] *S v Chapman* 1997 (3) 632 at 345.
[223] Section 12 (1) of the Constitution of the Republic of South Africa, 1996.
[224] Section 12 (1) (c) of the Constitution of the Republic of South Africa, 1996.
[225] Section 12 (1) (d) of the Constitution of the Republic of South Africa, 1996.
[226] Section 12 (1) (e) of the Constitution of the Republic of South Africa, 1996.
[227] Section 12 (1) (b) of the Constitution of the Republic of South Africa, 1996.
[228] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* 2003 (1) SA 389 (SCA).
[229] *Van Eeden v Minister of Safety and Security* supra (n 228) at para 13.
[230] Section 39 (1) (b) of the Constitution of the Republic of South Africa, 1996.

Additionally, Section 205 (3) of the Constitution specifically provides that the police service (which forms part of the state) have an obligation to '… prevent … protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.[231] Reading these two provisions together, along with certain provisions of international legal agreements such as DEVAW, the CEDAW, or General Comment 2, it may be said that the South African state has a clear obligation to take positive steps in attempting to decrease and prevent rape, as well as other sexual assaults, altogether.[232]

It therefore may be argued that although there appears to be some reluctance on the part of the state to involve themselves in private matters of the individual citizen, the state has an obligation, based not only in international law, but in case law and the Constitution itself, to do just that; important developments have been made in terms of international law which aid in preventing any impediments to the protection of women, or at least her rights, from the crime of rape.[233] It may therefore, be said that not only does the state have an obligation to investigate and punish crimes that have already taken place and that have been reported, but they have a responsibility to the inhabitants of South Africa to reduce and prevent rape and other forms of sexual violence from taking place among private citizens.

## 4.3. PROMINENT LEGISLATION PROTECTING AGAINST SEXUAL VIOLENCE: CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007 AND THE DOMESTIC VIOLENCE ACT 116 OF 1998

Possibly two of the more prominent expression of laws pertaining to the protection of women from sexual violence are the Sexual Offences Act,[234] and the Domestic Violence Act.[235] These Acts were adopted in response to the fact that South African law – both in statutes and under the common law – of the time did not adequately address or provide for the effective

[231] Section 205 (3) of the Constitution of the Republic of South Africa, 1996; these two provisions deal with obligation that the *Constitution* imposes on the state to uphold its Bill of Rights.
[232] L Di Silvio 'Correcting Corrective Rape: Carmichele and Developing South Africa's Affirmative Obligations to Prevent Violence against Women' (2011) 99 *The Georgetown Law Journal* 1469 at 1512.
[233] Fortin op cit (n 131) at 328.
[234] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[235] Domestic Violence Act 116 of 1998.

implementation of the laws relating to criminal sexual offences, such as rape.[236] As addressed above, the definition of rape has since been broadened and transformed by the Sexual Offences Act into what it is known as today. These two Acts are possibly some of the earlier examples of the state attempting to take steps in reducing violence against women.

The Domestic Violence Act provides for the protection of women against domestic violence, including sexual violence of which the crime of rape constitutes a form;[237] while this Act does not expressly stipulate that domestic violence is illegal, it provides that victims are entitled to apply for and obtain protection orders from the South African Police Service against their perpetrators,[238] whether that may be a stranger, or their own spouse. Upon breach of said protection order, a warrant of arrest may be issued against the perpetrator.[239] The Domestic Violence Act appears to place a significant responsibility upon the SAPS,[240] and by extension, the state, in assisting with the protection of women from domestic violence. The Sexual Offences Act provides a comprehensive 'framework for the provision of adequate and effective protection' to victims and survivors of sexual offences.[241]

These two pieces of legislation give rise to rights in the Constitution, such as equality, dignity and freedom.[242] They also acknowledge the obligations of South Africa under certain international agreements, such as CEDAW, to protect women from and eventually eliminate all forms of gender-based violence against women.[243] This acknowledgment gives effect to those provisions of the Constitution which provide that, at least to some extent, South African law cannot be considered in isolation.

One of the most important mandates provided by CEDAW's General Recommendation 35 is that states have a responsibility placed upon them with regards to drafting legislation and implementing measures that will lessen and eventually eliminate all forms of discrimination against women.[244] There is no denying that the Sexual Offences Act and the Domestic Violence

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[236] L Artz and D Smythe *Rape Law Reform in South Africa* (2008) 8.
[237] Section 1 (viii) (b) and Section 1 (xxi) of the Domestic Violence Act 116 of 1998.
[238] Section 4 of the Domestic Violence Act 116 of 1998; from here, the 'South African Police Service' will be referred to in text as 'the SAPS'.
[239] Section 6 (4) (b) of the Domestic Violence Act 116 of 1998.
[240] Section 18 (4) (a) of the Domestic Violence Act 116 of 1998.
[241] The Preamble to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 o 2007.
[242] The Preamble to the Domestic Violence Act 116 of 1998; Preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[243] The Preamble to the Domestic Violence Act 116 of 1998; Preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[244] Article 2 (f) of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

Act, throughout their various provisions, provide reasonable legal mechanisms through which rape and other sexual offences can be reported and punished; the increase in the amount of rapes reported after the definition was changed in 2007 proves that the Sexual Offences Act was, in a way, a success.[245] However, it should be noted that both Acts only address the steps to be taken after the incident has already occurred. It may be argued that the Domestic Violence Act contributes to the prevention of repeat sexual offences with regards to its provisions to do with protection orders.[246] Nevertheless, even then, the Act specifies a requirement that in order for a protection order to be issued by the court, there must be *prima facie* evidence that an act of domestic violence is being or has been committed.[247] This is in stark contrast with the Torture Act in which it is provided that the state bears the responsibility of promoting awareness regarding the prohibition of torture through information and education campaigns.[248] It may be argued that not including the importance of awareness surrounding the crime of rape and other sexual offences constitutes a notable oversight on the part of the legislators.

Furthermore, regardless of the progression and broadening of the crime of rape – the developments of which, despite the above criticism, have certainly been significant in terms of what it once was – based on the above, it is clear that are still gaps in some of the practical elements as well as the implementation of the Sexual Offences Act and the Domestic Violence Act. This is partly due to the attitude that the members of the SAPS have toward accusations of rape being reported.[249] The crime of rape or any other sexual violence, especially when committed as a form of domestic violence is often perceived as a private matter; the public sphere of the state, including the police, is often hesitant to involve itself in private matters concerning individuals.[250] Due to this attitude on the part of the police, victims tend to feel

[245] SAHRC 'Unpacking the Gaps and Challenges in Addressing Gender-Based Violence in South Africa' *South African Human Rights Commission,* April 2018, available at *https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf*, accessed on 19 June 2019 at page 17.

[246] Section 4 of the Domestic Violence Act 116 of 1998.

[247] Section 5 (2) of the Domestic Violence Act 116 of 1998.

[248] Section 9 (2) (a) of the Prevention of Combating and Torture of Persons Act 13 of 2013.

[249] Smythe op cit (n 203) at 116.

[250] SAHRC 'Unpacking the Gaps and Challenges in Addressing Gender-based Violence in South Africa' *South African Human Rights Commission,* April 2018, available at *https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf*, accessed on 19 June 2019 at page 13.

reluctant to report incidences of rape, or withdraw their matters, on account of them thinking that the police (and the legal system in general) will not believe them.[251]

## 4.4. PREVENTION OF COMBATING AND TORTURE OF PERSONS ACT 13 OF 2013

The Torture Act was adopted in 2013 in order to give effect to Section 12 (1) (d) of the Constitution, as well as to integrate the Torture Convention provisions into South African law.[252] The Torture Convention was signed by South Africa in 1993, to be ratified later in 1998, two years after the Constitution came into effect.[253] From this time, the Torture Convention was considered as applicable law in South Africa. The Bill bearing the same title as the Torture Act was published in the Government Gazette in the year 2012, and finally came into effect as an official Act one year later, approximately 29 years after the Torture Convention came into force in the international sphere.[254] Between the time the Torture Convention was ratified, and the Torture Act became applicable, South Africa took few measures to give effect to its obligations under the former, but for criminalising 'common assault' or 'assault with intent to commit grievous bodily harm' under the common law.[255]

With reference to the above, the laws governing the crime of torture have come a lot farther than what it was addressed as under the South African common law. Not only does the Torture Act acknowledge its obligations under international law,[256] but it also incorporates key human rights as contemplated in the Constitution; most notably, the rights to equality, dignity and freedom.[257] Additionally, as the definition of torture in the Torture Act and Torture Convention bear such resemblance, it can be argued that there is a possibility of the due diligence argument to be applied in South African law as well.

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[251] Smythe op cit (n 203) at 87.
[252] The Preamble to the Prevention of Combating and Torture of Persons Act 13 of 2013.
[253] United Nations 'Status of Treaties' *United Nations Treaty Collection*, 18 January 2019, available at *https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en*, accessed on 18 January 2019.
[254] Prevention of Combating and Torture of Persons Act 13 of 2013.
[255] Fernandez and Muntingh op cit (n 63) at 83.
[256] The Preamble to the Prevention of Combating and Torture of Persons Act 13 of 2013.
[257] Section 2 (1) (a) (i) of the Prevention of Combating and Torture of Persons Act 13 of 2013.

Further, like the Sexual Offences Act and the Domestic Violence Act, the Torture Act also places an obligation on the state, namely, that the state bears the responsibility to promote awareness regarding the prohibition of torture.[258] The state is tasked with promoting awareness through education and information campaigns;[259] as well as with properly training public officials to deal with complaints of torture and preventing torture from taking place.[260] This is incredibly important as not many are truly aware of what the legal definition of 'torture' is and that it involves the participation of a 'public official'. As such, many people are not aware that one of the most common forms of torture in South Africa is police brutality.

As mentioned above, the Torture Act, like the Torture Convention, defines 'torture' as 'any act by which severe pain or suffering … physical or mental, is intentionally inflicted on a person … for any reason based on discrimination of any kind'.[261] Keeping this in mind, the Constitutional right to equality provides that no one may be discriminated against on a number of grounds, including that of gender.[262]

It is necessary to recognise that there is somewhat of a link that exists between rape and torture in South African law. Put simply, if an act of gender-based violence (including rape) is conducted on the basis of discrimination, and an act of torture may be conducted for a reason based on discrimination, then the crime of rape may constitute an act of torture, provided that the necessary requirements of each crime are met. It is necessary to recognise the overlap and take note of the potential for legal development in these areas of law.

## 4.5.RAPE AS TORTURE IN SOUTH AFRICAN LAW

From the above discussion of the Sexual Offences Act, the Domestic Violence Act and the Torture Act, it may be said that the crime of rape and other sexual offences not considered as a direct form of torture in South Africa. As it is listed under Section 5 of the Torture Act, the crime of rape appears to be an aggravating circumstance to be considered in deciding whether an act was, in fact, torture, rather than the subject matter of the crime of torture itself.[263] From

[258] Section 9 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[259] Section 9 (2) (a) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[260] Section 9 (2) (d) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[261] Section 3 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[262] Section 9 (3) of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[263] Section 5 of the Preventing of Combating and Torture of Persons Act 13 of 2013.

this, a deduction can be made that rape and other sexual offences are seen as something somewhat lesser than torture, or rather, as the European Union and Inter-American legal systems have classified it, another form of ill treatment.[264]

The above is substantiated by South African case law including the matters of *K v Minister of Safety and Security,*[265] and *F v Minister of Safety and Security*.[266] In both of these matters, women had been raped;[267] the former, by an on-duty police officer and the latter, by an off-duty police officer driving in an unmarked police vehicle.[268] In both instances, the court found the perpetrators guilty of rape and found further, that there was a sufficient link to the SAPS to warrant the matter being brought against the Minister of Safety and Security (an actor of the state).[269]

Based solely off of the facts of the matters, both cases involved severe pain and suffering in the form of physical and (potentially) mental arm being inflicted on the victims for reasons based on gender discrimination. Furthermore, both matters involved the unlawful act being carried out by a public official who was, in accordance with the courts' findings, acting in an official capacity.[270] For all intents and purposes, the facts of both matters fit the requirements, not only of rape, but for torture as well. However, whether it is due to the court having been content that the sanctions that would be imposed upon the accused were satisfactory, or whether it is due to the crime of torture being considered, primarily, as one that takes place in the context of conflict and police brutality, the courts did not rule as such.

Does this mean that rape cannot be considered as a form of torture in South Africa? On the contrary. From what has been discussed in this paper until this point, the following is known to be true: first, international law (the Torture Convention and CEDAW along with its General Recommendations) all provide that there is an obligation upon states to protect private individuals by practicing due diligence and taking positive steps in reducing and preventing

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[264] *Opuz v Turkey* supra (n 191) at para 161.
[265] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
[266] *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).
[267] *K v Minister of Safety and Security* supra (n 265) at para 6; *F v Minister of Safety and Security* supra (n 266) at para 14.
[268] *K v Minister of Safety and Security* supra (n 265) at para 3; *F v Minister of Safety and Security* supra (n 266) at para 18.
[269] *K v Minister of Safety and Security* supra (n 265) at para 6; *F v Minister of Safety and Security* supra (n 266) at para 18.
[270] *K v Minister of Safety and Security* supra (n 265) at para 3; *F v Minister of Safety and Security* supra (n 266) at para 18.

private individuals from incurring harm, whether inflicted by a public official or by another private individual.[271] Secondly, South African domestic law (the Sexual Offences Act, the Domestic Violence Act and the Torture Act) provides for the same thing – the state bears an obligation to take steps, to the best of their ability and in accordance with protecting Constitutional rights as well as upholding the international law, to prevent anyone from suffering harm, whether that harm may be in the form of rape or torture.[272] Thirdly, although it is never an explicit one, there does exist a link between the crimes of rape and torture – they are both given effect to and protected against by Section 12 of the Constitution.[273]

The two crimes are also protected against by the provisions in the Constitution which deal with the importance of international law. Through these provisions, international are applicable in South Africa. First, there is Section 39 (1) (b) which, as above, provides international law must be considered when interpreting domestic laws; the interpretation of domestic laws should not be in contravention of international law agreements.[274] Secondly, there is Section 231 which provides that international law becomes binding on the state of South Africa when it has been signed, ratified and transformed into domestic legislation;[275] international treaties that meet these requirements can be directly applied in South African law.[276] To put it simply, if international law is directly applicable in South Africa, it can be argued that rape may be considered as a form of torture in South Africa, despite the domestic legislation not having linked the two directly.

From the moment all the above requirements are met, the international law is directly applicable in South Africa.[277] This means that the Torture Convention and CEDAW, along with other international human rights agreements which have been signed, ratified and transformed into domestic legislation by South Africa are considered to be as directly

[271] J Goldscheid and DJ Leibowitz 'Due Diligence and Gender Violence: Parsing its Power and its Perils' (2015) 48 *Cornell International Law Journal* 301 at 305; L Grans 'The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence' (2015) 15 *Human Rights Law Review* 695 at 704.
[272] Section 2 (a) of the Prevention of Combating and Torture of Persons Act 13 of 2013; the Preamble of the Domestic Violence Act 116 of 1998; the Preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
[273] Section 12 of the Constitution of the Republic of South Africa, 1996.
[274] Section 39 (1) (b) of the Constitution of the Republic of South Africa, 1996.
[275] Section 231 of the Constitution of the Republic of South Africa, 1996.
[276] F Sucker 'Approval of an International Treaty in Parliament: How does Section 231 (2) Bind the Republic' (2014) 5 *Constitutional Court Review* 417 at 423.
[277] Ibid.

applicable law.[278] The obligations imposed on the state by these international agreements, such as ensuring the protection of private individuals and taking positive steps to preventing harm, are also applicable and binding upon South Africa.

In terms of CEDAW, Article 16 of General Recommendation 35 provides that gender-based violence against women 'may amount to torture or cruel, inhuman or degrading treatment in certain circumstances' in contexts, including those of 'rape, domestic violence or harmful practices, among others'.[279] As stated above, this provision of General Recommendation 35 makes no mention of the public official requirement that the definition of torture does. This may be interpreted to mean that South Africa, as a party to the international agreement has an obligation to protect private individuals from being subject to the crime of rape, which may be considered as a form of torture, and take positive steps in an effort to reduce and eventually stop rapes from taking place altogether.

In terms of the Torture Convention, based off of case law and General Comment 2, it can be said that the international agreement has been interpreted and expanded upon, though perhaps not officially amended, to include the crime of rape as a form of torture.[280] While the crime of torture is usually thought of as taking place during a time of conflict and should include the involvement of a public official, the Torture Convention also provides for abuses that have been conducted by private persons.[281] The definition of torture in Article 1, as read in by the Committee Against Torture in the case of *Hajrizi Dzemajl*, provides that states have a responsibility to protect private individuals and should be held liable where it has failed to intervene in harmful acts being conducted by non-state actors.[282] This may be interpreted to mean that South Africa should be held liable in situations where they have not taken reasonable and positive steps in an attempt to prevent the crime of rape as a form of torture.

It is understandable that, in a country like South Africa, it is not necessarily realistic to believe that the state can or will prevent every instance of rape that takes place. This may be due to a number of factors including an unwillingness on the part of the victim to report the

[278] Sucker op cit (n 276) at 429.
[279] Article 16 of the United Nations Committee on the Elimination of all Forms of Discrimination against Women General Recommendation No. 35: Gender-based Violence against Women, Updating General Recommendation No. 19 (2017).
[280] The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 2: Implementation of Article 2 by State Parties (2008) at para 18.
[281] Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
[282] *Hajrizi Dzemajl v Yugoslavia* supra (n 133) at para 8.9.

crime, poor implementation of South African laws pertaining to rape, the reluctance on the part of the state to become involved in the matters of private individuals, or perhaps, inadequate laws, among many other reasons.[283]

The Torture Convention and CEDAW both cite that states must take positive steps in reducing the number of incidences that take place within their country. It can be argued that South Africa, a new and still-developing democracy, has made a positive step in drafting the legislation that protects against the crimes of rape and torture. However, the counter-argument can also be made that, apart from drafting the legislation, the state has not taken many other significant positive steps in preventing the crimes.

In addition, it can be said that the existing legislation, as mentioned above, certainly has room for improvement; for example, most of the laws pertaining to protection against rape and torture, instead of being *preventative*, are *remedial*.[284] The legislation and the bodies attempting to implement the 'preventative' mechanisms make provision for the punishments that may be handed down after the incident has taken place, should the relevant requirements be met;[285] in the instance of rape, these requirements are often difficult for the victim to meet. Preventative measures are not dealt with in either the Sexual Offences Act or the Domestic Violence Act. The only preventative measure stipulated in the Torture Act is that of promoting general awareness about torture;[286] even then the government has not done a good job of engaging with the public regarding the wrongs that are done to them and what may be classified as torture.[287] Therefore, it can be argued that the South African legislation does not properly and thoroughly encompass what is envisioned in the international law agreements; based on the above, it can

[283] Smythe op cit (n 203) at 11.
[284] L Fernandez 'Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as Adopted in 2002 by the United Nations General Assembly 57/ 1999: Implications of South Africa' (2005) 9 *Law, Democracy and Development* 113 at 131; South African bodies which have been put in place to attempt to *prevent* torture are 'essentially complaints driven and they 'rely on matters to be brought to their attention…'.
[285] Ibid.
[286] Section 9 of the Prevention of Combating and Torture of Persons Act 13 of 2013.
[287] Fernandez and Muntingh op cit (n 63) at 86 – 87; the government did not make much of an effort until compelled to by the United Nations Human Rights Committee after an incident took place involving South African prisons and an inmate victim who had suffered torture, according to the Human Rights Committee, by the hands of the police. The government proceeded to ignore the Human Rights Committee for approximately one year. Thereafter, the Parliamentary Portfolio Committee on Correctional Services took to holding public hearings in 2011. This, however, only resulted in showing how many 'system failures on the part of the state' there were.

be said that the state has not altered the legislation sufficiently over time so that it may reflect and aid the current-day reality.

Furthermore, it may be argued that due to the sheer number of criminal incidences, ranging anywhere between petty theft to murder, that are reported to the police on a daily basis plays a role in how the police respond to and approach reports of rape;[288] due to the other issues that the SAPS address, their concern may only be focussed on reports of 'real rape'. Smythe suggests that this notion of 'real rape' amounts to the 'extent of violence and injury' that accompanied the sexual assault.[289] In other words, if the harm done to the victim is severe enough, they will give it more importance than if an unscathed woman reports a rape. This kind of attitude towards rape reports further discourages women to come forward and lay a charge as women 'do not believe the police will believe them'.[290] As such, any efforts made by the legislation to put processes in place which would prevent further harm, are hindered.

Essentially, both with regards to the less than satisfactory legislation and the poor implementation thereof by the police, as well as the victims' attitude toward and opinion of the legal system, it can be said that the Torture Convention and CEDAW are not properly given effect to in South Africa. The state has not engaged in providing significant positive steps to combat and prevent sexual assault in South Africa, despite having committed to the international agreements a number of years ago. It is therefore put forward that the South African state does not thoroughly and properly comply with or meet its international obligations under either the Torture Convention or CEDAW.

### 4.6. CONCLUSION

This Chapter has explored the link between the crimes of rape and torture in South Africa through considering relevant pieces of South African legislation and case law. It has further discussed whether South Africa fulfils its obligations under the Torture Convention and CEDAW sufficiently or not.

[288] Smythe op cit (n 203) at 11.
[289] Smythe op cit (n 203) at 83.
[290] Smythe op cit (n 203) at 87.

This Chapter has found, first, that the Constitution places an obligation on the state to protect the rights of all persons, whether they be public or private actors. This obligation extends to South African domestic law in the Sexual Offences Act, the Domestic Violence Act and the Torture Act, in that they all place some kind of obligation on the state to uphold the Constitution. Additionally, all three Acts place a responsibility on the state to uphold and give effect to the international agreements of CEDAW and the Torture Convention, respectively.

This Chapter found that, through the application of international law in that the international agreements have been signed, ratified, and transformed into domestic law, they are directly applicable in South African law where the domestic law fails to meet the international law legislation. In this instance, due to the application of international law, rape may be considered as a form of torture under South African law, as it is in international law.

This Chapter has further found that due to a number of issues surrounding poor legislation, a failure to transform South African law with international law and over time, as well as the poor implementation of said legislation, South Africa does not appear to live up to the legal responsibilities placed upon it by the international agreements mentioned above.

South African domestic legislation does not provide for preventative measures, but rather for remedial ones that only come into effect after the incident of rape has taken place. Further, based solely off of the sheer amount of rapes that have been reported in the past year, it is clear that public officials, and the state at large, has not practiced due diligence in an effort to reduce and prevent acts of rape, which may be considered as a form of torture, from taking place. As such, it is concluded that South Africa fails in its international obligations under CEDAW and the Torture Convention in matters concerning rape, which may amount to a form of torture.

## 5. <u>CHAPTER 5</u>

In terms of this research paper, the following conclusions have been reached:

First, the current international, regional and domestic laws pertaining to the crimes of rape and torture in South Africa amount to what can be described as extensive and encompassing. The South African legal definitions of both crimes are not only broad so as to be open to interpretation, but they also closely reflect the international definitions of each crime.

Second, with regards to the link between rape and torture in international law, the only two documents in which the connection was explicitly recognised were General Comment 2 – which informs the Torture Convention – and General Recommendation 35 – which is supplementary to CEDAW. This link is supplemented through a number of judgments stemming from international and regional courts and tribunals which have found rape to be a form of torture in certain instances.

Beyond this, it was found that under both CEDAW and the Torture Convention, states bear a responsibility to protect private individuals from harm caused not only by public officials, but by non-state and private actors as well. CEDAW's General Recommendation 35 provides for this in Article 16, whereas the Torture Convention requires a doctrine of due diligence to be read into its definition.

Third, with regards to the link between rape and torture in South African law, perhaps the primary source would be the Constitution, considering that both crimes are protected against under Section 12. Further, the Constitution, much like the international law agreements discussed above, provides that the state has a responsibility to protect all persons and their rights (this extends to the South African domestic law discussed, above). The Constitution also stipulates that the state must uphold relevant and applicable international agreements, such as the Torture Convention and CEDAW.

The link between rape and torture is expanded upon when international law is directly applied to South African law after all the relevant requirements have been met. As such, based off of the direct application of CEDAW and the Torture Convention, rape may be considered as a form of torture in South Africa.

With regards as to whether South Africa fulfils its legal responsibilities under the international law discussed with regards to rape as a form of torture being conducted by private individuals, it may be said that the domestic legislation and surrounding issues leave much to be desired. South Africa's remedial, not preventative, measures as set out in domestic legislation do not comply with the international law obligation to practice due diligence and take positive steps in reducing and preventing the crime of rape. Resultantly, it may be said that the state of South Africa does not satisfactorily fulfil is obligations under the Torture Convention and CEDAW in matters concerning rape, which may amount to a form of torture.

Realistically, it is put forward that the South African legal systems in place, ranging from the forms that need to be filled out at the SAPS, to recounting the incident in court, are simply inadequate to deal with the vast amount of rapes that take place on a daily basis, whether violent and bloody or not. Although this is a grim truth, it should not prevent or discourage those who are capable of making a difference from attempting to decrease the amount of rapes that the country, and even the world at large, sees every day.

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